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Issue Date: 08 July 2004

CASE NO.: 2003-LHC-696

OWCP NO.: 18-059497

IN THE MATTER OF:

LARRY MANEN,
Claimant

v.

EXXON MOBIL CORPORATION,
Employer

APPEARANCES:

Arthur J. Brewster, Esq.,

On behalf of Claimant

Ira J. Rosenzweig, Esq.,

On behalf of Employer

Before: Lee J. Romero, Jr.
Administrative Law Judge

DECISION AND ORDER GRANTING
SECTION 22 MODIFICATION

This is a claim for a Section 22 Modification of compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. (herein the Act), brought by Exxon Mobil Corporation (Employer) against Larry Manen (Claimant).

On June 12, 1997, a Decision and Order was originally filed in this matter wherein Claimant was found temporarily totally disabled from March 17, 1995 and continuing, based on an average weekly wage of $1,025.07. Employer was ordered to provide all reasonable and necessary medical expenses, including surgical

intervention, arising from the February 17, 1995 work injury. On July 10, 1998, the Benefits Review Board (herein the Board) issued a decision affirming my finding that Claimant had not reached maximum medical improvement (MMI), but remanded the matter "for consideration of the evidence of record regarding the issue of whether employer established the availability of suitable alternative employment."

On April 28, 1999, a Decision and Order on Remand was filed in this matter, based on (1) the parties' stipulations that Claimant underwent L5-S1 discectomy surgery on March 20, 1998 and was temporarily totally disabled for a time following said surgery; and (2) briefs submitted by the parties on March 12, 1999. Claimant could not return to his former job as a maintenance specialist for Employer. Claimant was found employable within his physical restrictions, based on five positions identified by Employer and approved by Dr. Kendrick; the jobs "permitted alternation of postural positions and Claimant clearly possessed the skills, abilities and education levels to perform" them. Thus, on remand, it was determined Claimant was (1) temporarily totally disabled from March 17, 1995 to April 14, 1996, and from March 20, 1998 and continuing thereafter according to his average weekly wage of $1,025.07; and (2) temporarily partially disabled from April 15, 1996 to March 19, 1998, based on his residual wage earning capacity of $240.00 per week. This decision and order was affirmed by the Board in its May 15, 2000 unpublished Decision and Order.

On January 5, 2000, Employer filed a request for Modification, asserting Claimant was partially disabled as of December 1998. In 2001 the case was remanded to the District Director in light of the intradiscal electrotherapy (IDET) procedures Claimant was undergoing. Employer filed a second request for modification on October 10, 2002. After multiple reschedulings, a modification hearing was held in Metairie, Louisiana, on January 15, 2004. All parties in attendance were afforded a full opportunity to adduce testimony and offer documentary evidence. The parties introduced 34 joint exhibits which were admitted into evidence. The record was left open until March 2, 2004, to allow the parties to depose Dr. Oberlander and Mr. Milum, after which the record was closed.

The parties filed post-hearing briefs on March 23, 2004. Based upon the evidence introduced, my observations of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

Based upon the parties' stipulations submitted at the modification hearing on January 15, 2004, I find:

1. The Claimant was injured on February 16, 1995, while in the course and scope of his employment with Employer.

2. Claimant and Employer were in an employer-employee relationship at all relevant times.

3. Employer was notified of the injury on March 16, 1995.

4. Informal conferences were held on November 13, 2002 and July 17, 2003.

5. Claimant's average weekly wage at the time of injury was $1,025.07.

6. Claimant received temporary total disability benefits from March 17, 1995 to April 14, 1996, and from March 20, 1998 and continuing thereafter at a rate of $683.38 per week.

7. Claimant received temporary partial disability benefits from April 15, 1996 to March 19, 1998, at a rate of $523.85 per week.

8. Medical benefits have been paid, excluding the contested treatments, pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties include the nature and extent of Claimant's disability as of December 1998, and whether Claimant is entitled to pro-disc surgery, endless pool therapy and an in-home hot tub under Section 7 of the Act.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant lives eight miles from Harrison, Arkansas, and approximately twelve miles from the local shopping districts. (Tr. 93). Following his accident on February 16, 1995, Claimant underwent back surgery and follow-up treatment with Dr. Pieper,

who Claimant testified did not release him to work or declare him to be at MMI. Claimant then returned to his family physician, Dr. Collins, who referred him to Dr. Schlesinger who in turn referred him to pain management specialist Dr. Ketcham. When Dr. Ketcham relocated, Claimant continued treating with Dr. Covey. Claimant testified none of these doctors released him to work or considered him to be at MMI. (Tr. 94-95, 103). Only Dr. Runnels, Employer's consultative medical evaluator who examined Claimant on one occasion for 15-20 minutes, declared him to be at MMI and released him to work. (Tr. 95-96, 119).

Dr. Ketcham performed an IDET on Claimant's back to relieve the pain and pressure; Claimant testified he did not have any response to this procedure. (Tr. 103-04). A second IDET relieved Claimant's back pressure but caused other problems. Claimant testified he has continuing back pain with sciatica bilaterally, sporadic muscle spasms and a pins-and-needles sensation in his right leg with walking. Additionally, Claimant's scoliosis worsened and caused hip problems in the morning. Claimant testified he has suffered chronic, increased pain and stiffness since his back surgeries, particularly following the second IDET. Dr. Ketcham informed Claimant his condition would improve in a few days, but Claimant testified it took two months before he could walk without assistance. (Tr. 29-31, 105-07). Dr. Ketcham explained to Claimant his spinal cord overheated during the procedure, resulting in what could be cauda equinus syndrome. Claimant testified Dr. Moore agreed with this assessment. (Tr. 108-09).

Claimant treated with Dr. Ketcham for three to four years and has been on multiple medications since the initial back surgery including Oxycontin, Xanaflex, Celexa, Prilosec, Flomax, Neurontin, Gabitril and Viagra. Claimant testified he experienced many side-effects from these medications, including ulcers, nausea, memory loss, grogginess, loss of sleep and impotency. Claimant feels addicted to Oxycontin, but stated it is the best medication to help him tolerate his pain. (Tr. 98-102, 117).

Claimant testified he is a "couch potato" the majority of the time "these days." His activities mostly include light housework and occasional outside work but he does not lift much. (Tr. 29, 38-39). Claimant testified he was in a boundary dispute with his neighbor, Mr. Milum, explaining they are "not good neighbors." (Tr. 35, 120). Claimant was aware Employer hired Mr. Milum to take surveillance video of him working outside his house; he knew Mr. Milum videotaped him using a

chainsaw and raking some leaves, but Claimant testified he was on medication while performing these activities. (Tr. 121). The videotape also showed Claimant riding a lawnmower and tractor across his property. Claimant estimated he has ridden a lawnmower only 5-10 times within the last 5-6 years and only for short periods of time not exceeding 20 minutes. He occasionally raked leaves away from the house in the winter to prevent a fire hazard. Claimant testified the chainsaw in the videotape weighed 18 pounds and he only recalled using it once. Claimant also stated he has been on a tractor approximately 5 times in the last 5 years, for no longer than 20 minutes at a time; he used it to cross his property, but did not use it consistently or to do work because riding it hurt his back. Claimant stated he has never done work for longer than 30 minutes without having to take a break. (Tr. 40-45).

Claimant clarified that when he gets bored he tries to do chores outside even then he "ends up paying for it." (Tr. 123-24). Claimant further testified the video of him allegedly riding a bush-hog tractor and spreading gravel was actually his younger brother, Richard, who bears a strong resemblance to him and has done work around Claimant's property. Claimant also testified he has never taken a Southwest Airlines flight from Little Rock to Houston. (Tr. 124-27, 90-91).

Claimant stated he cannot sit or stand for too long and he does not drive longer than 20-45 minutes; even then he has to stop and stretch his back and legs. Indeed, at the hearing Claimant stood up twice during the first thirty minutes of his testimony. (Tr. 30-31). Since his accident Claimant drives 2 blocks to the mailbox on a daily basis, to church twice per week, to Wal-Mart once a week, travels 90 miles to Springfield, Missouri (MO), once a month and visits his father, who lives 35 miles away, every 3-4 weeks. Claimant testified traveling to Little Rock for doctor appointments was "an endurance test." (Tr. 32-33). He explained his ability to drive has worsened since 1998. (Tr. 33).

Employer questioned Claimant extensively about his checking account records; Claimant testified he and his wife have separate checking accounts. Pursuant to JX-29, Claimant wrote a number of checks at businesses around town during the time he was injured. The businesses included Neighbor's Mill, IBC, Nature's Wonder, Fred's Pharmacy and Wal-Mart, amongst many others. Claimant testified he is responsible for buying his family food; sometimes he was physically at the store but other times he gave his son or wife a check to go to the store for

him. Claimant testified he shopped at Wal-Mart on a regular basis and he may have stopped at other stores on his way home. (Tr. 56-64). Claimant often bought items at hardware stores which his son or brother would use to fix things around the house. He testified that shopping at Wal-Mart was "too much" for him requiring him to sit down a few times on store benches. (Tr. 29, 35, 85).

Claimant made two overseas missionary trips with his church following his work accident; he traveled to Russia in 2002 and the Philippines in 1998. Claimant did not tell his doctors or seek their approval and he failed to admit to these trips in his deposition; Claimant explained at the hearing that his medication caused him to forget things. (Tr. 46-48, 51). Claimant testified he had to double-up on muscle relaxants to be able to tolerate the 18-hour flight to Russia. While in Moscow, Claimant's group was shuttled around town on a bus; his main activity was to hand out paperback Bibles. Claimant testified they had 10-12 hour days filled with sporadic, low stress activities. He continued to take his medications throughout the trip and was able to alternate between standing and sitting while on the bus. (Tr. 49-50, 108, 122). While in the Philippines, Claimant traveled around in vans, and did much of the same activities as in Russia, for 8-10 hours a day. (Tr. 51-52).

Claimant testified his back pain has been mostly the same since 1998; he has good and bad days, but no extended period of good time. (Tr. 46). He completed physical therapy sessions at Health South, which had a whirlpool but no aqua- or hydro-therapy capabilities. Based on Marcus Jones' and Dr. Ketcham's recommendations for hydrotherapy, Claimant requested Employer to provide him a pool and hot tub at his house. Claimant testified at the hearing that such therapy was available at a new facility, Mountaincrest. Claimant still maintains his request for an in-home hot tub as Mountaincrest's whirlpool is not heated. Claimant stated that after he sat in a hotel hot tub he felt the best he has felt in eight years; a Jacuzzi bathtub provided minimal relief, but not as much as the hot tub. (Tr. 97-98, 110-12).

Claimant also testified he desired to be evaluated at the Texas Back Institute to see if he is a candidate for pro-disc surgery. This procedure was recommended by Dr. Ketcham and is currently undergoing FDA trial for approval. Claimant testified he understood the procedure to be less invasive than disc fusion and would relieve his back and hip problems. (Tr. 113-15).

Claimant testified he would like to undergo this procedure, if he is a candidate. (Tr. 117-18).

Finally, Claimant testified he has not looked for work since 1998 because his treating physicians have not released him to work. Although he will test his limits on a good day, Claimant did not think he could work consistently in a job. Additionally, he was worried about the side-effects from his medications and how they would affect his ability to work. (Tr. 118-19). Before working at Employer, Claimant owned a bar, restaurant, heating/AC business and operated heavy equipment. He testified he does not type well due to osteoarthritis in his hands. (Tr. 127-29).

Michael Sellars

Mr. Sellars has been a private investigator for the past 12 years, with prior experience in the military and law enforcement fields. Specifically, he worked for the City of Houston in the patrol and investigation divisions for 16 years. (Tr. 131). Mr. Sellars testified Employer hired him to investigate Claimant. He worked with Employer's Houston staff and traveled to Arkansas on 6 separate occasions, averaging 3 days each visit for a total of 15 days surveying Claimant. (Tr. 132-33). Employer also hired Mr. Sellars to conduct surveillance of Claimant's brother, Richard Manen; Mr. Sellars videotaped Richard Manen on two separate occasions and met him face-to-face once. (Tr. 135). Mr. Sellars testified Mr. Manen did not resemble Claimant as the two had different mannerisms, builds and statures. He stated the person riding the tractor in the videos was Claimant, not his brother. However, Mr. Sellars also admitted the hilly and heavily wooded terrain of Claimant's property impeded his ability to monitor Claimant. (Tr. 133-36).

On Mr. Sellars' first trip to Arkansas in November, 2001, sleet and snow prevented him from monitoring Claimant. The weather was improved on his next visit in January 2002, when he observed Claimant clearing the land around his house and noticed fires burning. Mr. Sellars stated he heard a chain saw, but did not see it being used; he did not see anybody else on Claimant's land. (Tr. 137-40). The following day, Mr. Sellars observed Claimant visiting his father and brother. On the third day Claimant did additional raking, rode a lawnmower and helped lock a tractor down on a flat-bed truck. (Tr. 141-42).

In April 2002, Mr. Sellars returned to Arkansas and observed Claimant performing similar activities as he did on his

earlier trip. Mr. Sellars testified that in one day Claimant went to Wal-Mart, Sonic, the post office, insurance company and two houses with his wife. The next day Mr. Sellars observed Claimant moving cars from his driveway and spreading gravel. Although the work was intermittent as the loads arrived, Mr. Sellars testified Claimant worked all morning and his brother Richard was not present. (Tr. 142-45).

On May 19, 2002, Mr. Sellars returned and observed Claimant receiving visitors at his home and then running errands. Mr. Sellars testified that on May 20, 2002, Claimant drove his Nissan Maxima to Little Rock. He followed Claimant the entire way; although he lost Claimant in the city, Mr. Sellars testified he observed Claimant enter the airport, park his car and check in for a Southwest Airlines flight to Houston. (Tr. 146-48). He stated the person he observed in the airport had the same shirt and stature as Claimant and drove the same color Nissan Maxima. Mr. Sellars bought a ticket for the same flight and stated he got a close-up look at Claimant on the airplane. However, he admitted he did not have a clear view of the individual's face. Even though the airline's flight information did not have any record of Claimant, Mr. Sellars testified he still placed Claimant on the flight. (Tr. 148-50, 166-67). Once in Houston, Mr. Sellars lost Claimant, then observed him entering an office building for the Orthopedic Group and Houston Sports Medicine practices. Mr. Sellars testified he called the offices on a ruse, but they had no record of Claimant. (Tr. 152-53).

Mr. Sellars returned to Arkansas in August 2003; he monitored Claimant walking his dog and driving 30-40 minutes to visit his father and brother. In October 2003, Mr. Sellars followed Claimant to his deposition in Little Rock. (Tr. 154-56). Mr. Sellars testified he also investigated Claimant's son at Employer's request. The son moved between Arkansas and Illinois, although he did not actually observe him in Illinois. (Tr. 156-58). Finally, Mr. Sellars testified he saw Claimant using a cane and walker to get around, and he appeared to have difficulty getting in and out of his car. (Tr. 157).

On cross-examination, Mr. Sellars testified he only has snippets of film documenting Claimant's activities. He emphasized the film supports his eyewitness observations. Mr. Sellars admitted there was no clear shot of Claimant riding a tractor in January or April 2002. (Tr. 170-72).

Randy Lee Milum

Mr. Milum testified by telephonic deposition on January 6, 2004. Mr. Milum has lived at 4995 Gander Lane in Harrison, AR, since August 1998; his property adjoins that of Claimant. Mr. Milum testified the area was fairly rural, "heavily wooded and brushed out with scrub timber and trash." (JX-33, pp. 5-6). Mr. Milum and Claimant have had disputes over their property boundary lines, which have gone to court multiple times. He also admitted he and Claimant had "exchanged words on several occasions" and they each have been arrested or placed under restraining orders at the other's urging. (JX-33, pp. 7-8). Mr. Milum stated he felt he was successful in court, and as there were no matters pending his testimony in the present matter would not affect the outcome of his disputes with Claimant. (JX-33, pp. 8-10).

Mr. Milum testified he took videotape surveillance of Claimant at Employer's request; he used his own camera, but did not alter or edit the videotapes in any way. He testified there was no doubt he filmed Claimant, and the activities on the tape were typical of Claimant's daily activities. Mr. Milum stated Claimant's activities had increased in the past 2 years; he observed Claimant drive a tractor, move large stumps around, shovel gravel, and climb up and down to load the tractor onto a trailer. (JX-33, pp. 11-14). Mr. Milum saw Claimant on the tractor in excess of a hundred times since April 2002, although only eight or nine times did Claimant drive the tractor over Mr. Milum's property. Mr. Milum also testified he saw Richard Manen work outside Claimant's house in 1997/1998, and he can distinguish the two men. (JX-33, pp. 15-16).

Mr. Milum testified he saw Claimant shovel gravel with a tractor and a hand shovel on and off for a couple of weeks in 2002. Claimant allegedly worked from 9:00 a.m. until 3:00 p.m., with regular breaks. Mr. Milum also saw Claimant climb ladders; specifically he observed Claimant set up a 10-foot extension ladder to repair his roof in July 2000. (JX-33, pp. 17-21). Mr. Milum testified Claimant has used a ladder to trim tree branches a couple of dozen times over a six year period. (JX-33, pp. 21-23). Between May 1998 and January 1999, Mr. Milum observed Claimant burning brush, dragging branches, using a weedeater and chainsaw, chopping firewood and splitting logs. He allegedly saw Claimant cut down a full-size tree and chop it up into firewood. (JX-33, pp. 23-26).

Mr. Milum testified he has never seen Claimant use a cane. Claimant purportedly leaves his property on a daily basis. Mr. Milum further testified he witnessed Claimant load furniture and appliances onto a U-Haul truck in March 2004 for 2.5 to 3 hours. (JX-33, pp. 27-30). Mr. Milum testified Claimant offered him $100,000 to stop cooperating with Employer in connection with the present matter. (JX-33, p. 32). Mr. Milum further explained he started filming Claimant in May 1998; he has an estimated 30 hours of videotape from the past 6 years. He also kept a journal of important encounters he had with Claimant since that time. (JX-33, pp. 34, 44-47, 51). Mr. Milum testified he used a basic RCA camcorder to tape Claimant, but he did not know the dates on which he videotaped Claimant because the date function on his camcorder was not activated. (JX-33, pp. 52-53, 57-58).

Mr. Milum clarified he initiated contact with Employer's counsel, and was not paid any compensation for his services. (JX-33, pp. 68-69).

The Medical Evidence

Daniel Pieper, M.D.

Claimant presented to Dr. Pieper, a neurosurgeon, on March 12, 1998, with complaints of muscle spasm, intermittent burning dysesthesias in the SI distribution; he stated he could not sit long periods of time without experiencing pain. Claimant's symptoms had not changed since his 1996 and 1997 MRIs which showed a herniated disc at L5-S1 as well as S1 nerve root compression. (JX-4, p. 1). Physical examination revealed hyperesthesia along the L5-S1 left distributions, problems with heel walking on the left and negative straight leg raise bilaterally. Dr. Pieper reported an MRI indicated L5-S1 abnormalities consistent with a calcified disc, as opposed to disc herniation. Dr. Pieper also noted diffuse findings at L3-4 and L4-5 with mild canal stenosis at L3. He stated in his reports that the new onset of burning dysesthesia was consistent with chronic pain syndrome, and possible permanent nerve injury in the left S1 distribution. Id. at 2.

Dr. Pieper considered Claimant to be a possible surgical candidate. Indeed, Dr. Pieper performed a left L5-S1 diskectomy on March 20, 1998; his post-operative diagnosis of Claimant was "calcified lumbar herniated disc L5-S1." (JX-4, pp. 2-4). On September 1, 1998, Dr. Pieper stated many of Claimant's symptoms had resolved or lessened. He recommended an MRI to rule out

further compression, EMG/NCV studies of the lower extremities to monitor neuropathy and physical therapy. A lumbosacral MRI and EMG/NCV studies were performed September 22, 1998. The EMG correlated with chronic neuropathy and radicular pain. As such, in October 1998, Dr. Pieper opined a full recovery was unlikely and further surgery would not be helpful; rather, Claimant required long term pain control. Id. at 6-9.

As of February 3, 1999, Claimant's back and radicular pain had not improved. Dr. Pieper noted EMG/NCV studies revealed long term radiculopathy while a lumbar MRI revealed only mild scarring. Claimant had returned to full use of the muscles in his lower extremities, but still required long term pain management. Id. at 10.

William Money, M.D.

Dr. Money, an anesthesiologist and pain management consultant, performed a dolorology consultation of Claimant on December 15, 1998. Claimant presented with complaints of thoracolumbar left hip pain, as well as lumbosacral pain and left radiating pain which continued after his March 1998 L5-S1 laminectomy and diskectomy. Dr. Money noted a September 22, 1998 MRI showed mild bulging at Claimant's L2-3, L3-4 and L4-5 levels, with epidural fibrosis at L5-S1. Physical examination revealed facet tenderness at L4-5 and L5-S1; straight leg raise testing was negative. Dr. Money recommended a lumbar SPECT scan and 4-6 weeks of physical therapy, but did not feel Claimant's condition merited hot tub treatment. (JX-7, pp. 1-2).

Vincent Runnels, M.D.

Dr. Runnels, a neurosurgeon, performed a medical examination of Claimant for Employer on December 22, 1998. Claimant presented with complaints of pain in his low back, left hip and leg, marked stiffness in his low back which was worse in the morning or with prolonged sitting, and cramps and a pins-and-needles sensation in his leg. His worst pain was from the back thigh down to the knee and was aggravated by standing, walking and bending. Claimant also complained of his back cracking and popping. (JX-6, p. 1).

Upon examination, Dr. Runnels found Claimant to be 5'7" and 175 pounds. His MRIs showed a herniated disc at L5-S1 which had been removed successfully, as well as degenerative disc disease, facet arthropy, and a residual midline herniation. (JX-6, pp. 1-2). Claimant was neurologically intact, with SLR of 90

degrees bilaterally. Dr. Runnels noted Claimant had a family history of arthritis and colitis; he opined the stiffness and soreness in Claimant's back could be related to rheumatoid spondylitis. Dr. Runnels also noted Claimant's degenerative disc disease was aggravated by the disc surgery. Id. at 2. He recommended various tests as well as a lumbar supporter and a regimen of anti-inflammatories, hot baths and William's flexion exercises. He opined Claimant had a 10% whole body disability which was related to his herniated disc and surgery; his additional disability, including the disc disease, preceded the work injury. Id. Additionally, Dr. Runnels opined Claimant may or may not have unilateral spondylolysis at L5, rheumatoid spondylolysis and/or ulcerative colitis, which could be associated with his chronic low back pain and morning stiffness. Id.

Dr. Runnels stated Claimant had reached MMI with respect to his herniated disc. However, when combined with the chronic arthritis, Claimant's back condition may limit his employability to sedentary labor activities. Dr. Runnels assigned Claimant permanent restrictions of no repetitive bending, overhead work, lifting greater than twenty-five pounds and advised him to avoid cold environments. (JX-6, p. 3).

S. Michael Jones, M.D.

Dr. Jones performed a rheumatologic consultation, Level 5, of Claimant on December 27, 1999, to rule out inflammatory arthritis. Dr. Jones noted Claimant's history of a work accident with subsequent low back pain and unsuccessful surgeries. Claimant presented with complaints of dull and constant low back pain which was worse in the evenings and with use. Claimant also complained of stiffness which was worse with use and occasional radiating pain to his knee. He did not exhibit signs of synovitis. Claimant's medications included Soma, Celebrex, Arthrotec, Prilosec, ibuprofen and aspirin. (JX-11, p. 1).

Dr. Jones diagnosed Claimant with degenerative disease involving the hands, neck and back, with multifactorial back pain. He also assessed Claimant with generalized musculoskeletal discomfort with "possible fibromuscular tender point exam, highly suspicious for underlying myofascial type chronic pain syndrome." Id. at 2.

Harvey L. Friedlander, M.D.

Dr. Friedlander, an orthopedic surgeon, evaluated Claimant on July 10, 1996, and again on April 19, 2000. He also issued supplemental reports on February 27 and September 5, 2001. (JX-18, p. 1). Dr. Friedlander examined Claimant on April 19, 2000, at Employer's behest. Claimant's chief complaint was of symptoms "referable to mid back, lower back, and both lower extremities, left greater than right." Claimant also complained of constant moderate to severe pain in the lumbosacral area, with occasional mild to moderate pain radiating to the right foot, as well as burning and weakness in both lower extremities. Claimant reported taking Soma, Celebrex, Elavil and Prilosec. Id. at 8, 10-12. Upon examination, Dr. Friedlander noted Claimant leaned on his right foot when standing to relieve back pain. He did not find any tenderness or scoliosis, but noted "mild decrease lumbar lordosis." Dr. Friedlander also found moderate lumbosacral spasm, moderate decrease flexion, normal side rotation, pain with flexion, extension and lateral bending, and positive bilateral straight leg raise test. Id. at 12-13.

Dr. Friedlander reviewed Claimant's medical records from Dr. Schlesinger, Dr. Money, Dr. Pieper, Dr. Ingraham, Dr. Runnels, Dr. McAlister, Dr. Mitchell, Dr. Kendrick, Dr. Hunt and Marcus Jones, MPT. Id. at 14-18. Dr. Friedlander's diagnosis included thoracic strain, lumbar radicular syndrome to both lower extremities, complete sacralization of L5 and degenerative arthritis in the lumbosacral spine. He also noted Claimant's prior abnormal MRIs and calcified herniated disc at L5-S1 pursuant to the operative report. Dr. Friedlander noted Claimant's treatment depended on the results of further diagnostic studies. He recommended further pain management and medical monitoring; analgesic, anti-inflammatory and muscle relaxant medications; occasional trigger-point injections; physical therapy not to exceed two weeks, twice per year; lumbosacral support; transcutaneous electrical nerve stimulator (TENS); epidural steroid injections; facet and nerve blocks; and possible surgery. (JX-18, pp. 19-22). Overall, Dr. Friedlander opined Claimant's condition in April 2000 was worse than his first treatment in July 1996; he further opined Claimant could do light duty work in a standing or walking position with minimal physical demands. Id. at 22.

At the request of Employer, Dr. Friedlander reviewed videotape of Claimant dated March 2, 3 and 7, 2001, and issued a supplemental report on September 5, 2001. The scenes in the videos depicted Claimant allegedly performing various chores on

his property. Dr. Friedlander stated that "at no time could I identify the man in these two videocassettes as being the man who was seen in my office … who identified himself as Larry Manen." Id. at 1-5. He noted the videos were taken from a distance and were of poor quality; at times it appeared the camera was being swung about with no attempt to focus on any particular object. Dr. Friedlander stated the person in the video would bend slightly at the waist with knees flexed, would squat down, appeared to use a small power tool, pulled some dead wood out of the trees, lifted some small objects out of a pickup truck and rode a lawn mower cutting his grass. Although nothing in the videotape was inconsistent with Claimant's decreased flexion, Dr. Friedlander noted the individual in the tape did not walk with a limp or use a cane. However, Dr. Friedlander further reported none of the activities depicted in the videotape exceeded Claimant's restrictions; he appeared to only do light work and did not engage in repetitive bending, twisting, turning or lifting/carrying heavy objects. Nothing in the videotapes changed Dr. Friedlander's opinion regarding Claimant's physical abilities. Id. at 5-6.

Robert W. Hunt, M.D.

Dr. Hunt, an orthopedic surgeon, initially treated Claimant in 1996 following his work injury, and re-evaluated him on April 19, 2000 at the request of Claimant's attorney. Claimant presented with low back pain with a burning sensation radiating into both lower extremities, left greater than right. Claimant stated his pain was aggravated by prolonged sitting, standing and walking in addition to repetitive bending, stooping and squatting. (JX-19, pp. 23, 25). Upon physical examination, Dr. Hunt noted full lumbar range of motion with pain only at the extremes, normal heel-toe walking, positive straight leg raise tests at 25 degrees sitting and 70 degrees supine, negative neck flexion, discomfort with hyperextension of the hips and negative Tinel's signs. Id. at 25-26. Thoracic and lumbosacral x-rays taken at this visit revealed spurring at L5-S1, but were negative for fracture, dislocation or bony pathology. Id. at 26.

Dr. Hunt fully reviewed and summarized Claimant's medical history and reports from various doctors. In light of Claimant's condition and current pain complaints, he recommended further diagnostic studies including an MRI with gadolinium and neurodiagnostic testing of Claimant's lower extremities and lumbar paraspinous muscles. Dr. Hunt related Claimant's injury to his industrial accident; he indicated Claimant has remained

in permanent and stationary status since he originally examined him in 1996. Dr. Hunt recommended Claimant not perform heavy work, weight-bearing activities or sitting longer than 45 minutes in an 8-hour day without the opportunity to change positions as needed. He recommended continuing medical treatment, with the possibility of additional surgery in the future. Dr. Hunt also opined vocational rehabilitation services were needed as Claimant cannot return to his former job. (JX-19, pp. 33-36).

David Oberlander, M.D.

Dr. Oberlander, a board-certified neurologist, examined Claimant on three separate occasions upon referral from Dr. Ketcham. He first examined Claimant on May 1, 2000, at which time Claimant presented with stiffness in his low back with pain radiating into his left foot; the pain only minimally improved following a 1998 L5-S1 diskectomy of a herniated disc. Claimant reportedly stopped his car 14 times during the 2.5 hour drive from his home in Harrison to Dr. Oberlander's office in Conway, Arkansas. (JX-32, p. 19). A neurological examination revealed diminished sensation in Claimant's left big toe, bilaterally positive straight leg raise test at 45 degrees, and low back pain, numbness, tingling and tenderness. The exam indicated possible L5-S1 nerve root impairment on the left side. Dr. Oberlander noted EMG studies revealed denervation on the left side of the S1 nerve root, indicating chronic radiculopathy. (JX-32, pp. 20-21). Dr. Oberlander opined Claimant was unable to perform any job which required him to sit, stand or walk for more than 5 minutes at a time, which he acknowledged would restrict Claimant from virtually all employment. Id. at 21.

Dr. Oberlander next examined Claimant on March 19, 2002; Claimant's chief complaint was "low back pain with tingling and numbness in the right leg." Claimant also complained of spasm in his back. A neurological examination was consistent with "a history of questionable early neuropathy on the right side." Id. at 12-13.

Dr. Oberlander's last examination of Claimant took place on October 7, 2003. Claimant presented with similar complaints of low back pain, tingling and numbness in the right leg, and spasm; his symptoms had reportedly worsened over the previous months. Dr. Oberlander noted spasm in Claimant's lower back upon examination, he also noted Claimant walked with a slight limp. Dr. Oberlander's diagnosis did not change, although he

acknowledged an EMG study suggested "possible L5 bilateral nerve root impingement." Id. at 1-2.

Jeffrey Ketcham, M.D.

Dr. Ketcham testified via deposition on November 18, 2003. He has been board-certified in anesthesiology and pain management since 1990, and the parties accepted him as an expert witness in these fields. Dr. Ketcham testified he first treated Claimant on January 26, 2000, on a referral from Dr. Schlesinger. Dr. Ketcham was provided a history of Claimant's 1995 back injury, the L5-S1 diskectomy in 1998 and his continuing radicular back pain. (JX-10, pp. 2-3). He noted physical therapy and conservative treatment was only minimally effective.

An initial examination revealed decreased range of motion in Claimant's lumbar spine, mild myofascial pain, post-laminectomy scar, radicular pain and negative straight leg raising tests; Claimant was pleasant and did not exhibit pain behaviors. Dr. Ketcham testified Claimant had multi-level degenerative changes in his back. (JX-9, p. 1; JX-10, p. 3). His short term treatment included analgesic medications, a duragesic patch, Zanaflex, Paxil and Neurontin, as well as epidural injections. Dr. Ketcham noted long term treatment may include IDET procedures and possible spinal cord stimulation. (JX-9, p. 2).

Dr. Ketcham testified Claimant was not at MMI and could not return to work as of January 2000. On February 15, 2000, he performed an epidural steroid injection. An MRI performed May 1, 2000, indicated degenerative changes with diffuse disc bulges at L2-3, L3-4 and L4-5, as well as degenerative changes and an epidural scar at L5-S1. (JX-10, p. 4; JX-9, pp. 4-8). On May 11, 2000, Dr. Ketcham noted Claimant did not have significant relief from the epidurogram and complained of a popping sensation, stiffness, soreness and pain in his low back, as well as a burning sensation in his leg. A lumbar diskogram performed on July 27, 2000, revealed multi-level degenerative disc disease from L2-3 through L5-S1, including a small herniation and post-surgical changes at L5-S1 and mild canal stenosis at L3-4 and L4-5. Dr. Ketcham indicated Claimant was a good candidate for an IDET procedure. (JX-9, pp. 9-17; JX-10, p. 4).

Dr. Ketcham next examined Claimant on August 15, 2000, noting his low back pain and left leg pain were the same, but his right leg pain had become bothersome. Claimant preferred

oral medication to continued epidural injections. Dr. Ketcham recommended the IDET at L3-4 and L4-5; he testified the procedure was akin to patching a tire to prevent a bulge. Dr. Ketcham also stated IDET procedures had a success rate of 70% in patients, with 60% reporting long term improvements, but prior surgeries lower the success rate. (JX-10, p. 5; JX-9, pp. 19-20). The IDET was denied by Employer on November 16, 2000, as "investigational." Dr. Ketcham noted Claimant was not a good candidate for surgery. (JX-9, pp. 21-22).

Claimant presented to Dr. Ketcham on January 31, 2001, with complaints of significant back pain, pressure and spasms as well as left leg radicular pain. He was placed on a trial of OxyContin. On March 28, 2001, Claimant reported the OxyContin worked well, resulting in minimal problems or grogginess. Dr. Ketcham did not note any pain behaviors in Claimant, and scheduled him for an IDET at the L4-5 and L5-S1 levels. (JX-9, pp. 24-26). The IDET was performed on April 12, 2001; at his April 19, 2001 follow-up visit, Claimant presented with some radicular hip pain and wore a lumbar corset. Dr. Ketcham limited Claimant from lifting more than 10 pounds and restricted him from work altogether until he recovered from the IDET. Id. at 28-29. Dr. Ketcham testified Claimant initially improved, then plateaued and eventually slipped back into the same pain conditions. On September 10, 2001, Dr. Ketcham noted Claimant was not a surgical candidate, but recommended a second IDET procedure. (Id. at 32-34; JX-10, pp. 5-6).

Dr. Ketcham performed a second IDET on November 8, 2001, at the L3-4, L4-5 and L5-S1 levels. At Claimant's follow-up appointment on November 19, 2001, Dr. Ketcham noted Claimant had suffered dispersal heat damage to his spinal cord during the IDET procedure. As a result, Claimant had multiple problems with leg weakness and partial cauda equina syndrome, which Dr. Ketcham testified occurs in 1% of cases. The IDET did help relieve some of Claimant's back pressure and pain. Dr. Ketcham noted Claimant's leg condition was one risk of the IDET procedure, but was usually temporary in nature. (JX-9, pp. 35-37; JX-10, pp. 6-7).

At his November 27, 2001 follow-up appointment, Claimant reported he had fallen twice secondary to his right leg giving way; however, Dr. Ketcham noted his gait was steady and his strength was slowly improving. He also noted an injury to Claimant's central nerve structures and prescribed rehabilitative therapy. (JX-9, pp. 43-45). On December 10, 2001, Dr. Ketcham noted Claimant was "definitely better," his

legs were much stronger and he did not require a walker. Id. at 51.

Dr. Ketcham testified Claimant was not at MMI as of the second IDET procedure and was unable to work as of January 27, 2002. In a January 29, 2002 letter to Employer, Dr. Ketcham indicated Claimant could not lift more than 15 pounds, stoop, squat or bend repeatedly, climb more than one flight of stairs twice a day, or climb ladders at all. He opined Claimant should be able to do sedentary work "within 30-60 days at the latest." (JX-9, pp. 53-54; JX-10, p. 8). On March 4, 2002, Claimant presented to Dr. Ketcham with improved back pain, but continued muscle spasm and cramping sensation in his legs. Dr. Ketcham also noted numbness in his left thigh and hip. Claimant used a cane for balance, but exhibited good strength in his lower extremities. (JX-9, pp. 55-56).

Dr. Ketcham treated Claimant on April 22, 2002 and June 25, 2002, noting he pushed himself in physical therapy which added to his back pain, and continued to use a cane. Claimant's recovery was slow yet progressive in nature. He continued to take OxyContin, Zanaflex, Celexa, Flomax and Neurontin. At the June appointment, Claimant indicated he had relief from his back pain with use of a hot tub. Dr. Ketcham did not note any neurological changes, and diagnosed Claimant with subtotal cauda equina syndrome, post-IDET. He recommended long-term hot tub therapy and aquatic therapy. Id. at 58-63.

Claimant's condition was unchanged through September 2002. On October 16, 2002, Dr. Ketcham wrote a letter of referral to the Texas Back Institute, indicating Claimant's condition had plateaued since March 2002, although he continued to have pain. The medications allowed Claimant a reasonable level of activity, but he was unable to work. On November 8, 2002, Dr. Ketcham noted Claimant was not capable of sedentary work activities, although he may be able to perform sedentary "life activities." (JX-9, pp. 65-71). Dr. Ketcham last evaluated Claimant on March 4, 2003. He assessed Claimant with degenerative disc disease multi-level, failed back surgery, intractable back and leg pain, and partial cauda equina syndrome. Id. at 77-78.

Dr. Ketcham noted an endless pool and treadmill were medically necessary due to Claimant's physical condition. He testified an endless pool is one with a forced jet of water Claimant would walk against. He stated aquatic therapy would be extremely beneficial for Claimant. (JX-9, p. 81; JX-10, pp. 8-9). After being informed of the Mountaincrest Rehabilitation

facility near Claimant's home, Dr. Ketcham testified he would recommend aquatic therapy at that facility, in addition to a hot tub being provided at Claimant's home. Dr. Ketcham explained an in-home hot tub would help Claimant's chronic back pain and would make his transition back to work much easier. The hot tub would specifically help Claimant's muscle spasm and back pain, while aquatic therapy would build his physical abilities and endurance. He recommended an FCE and testified Claimant could probably return to light or sedentary work part-time on a trial basis, with continued physical therapy. (JX-10, pp. 9-11, 14).

Dr. Ketcham testified Claimant probably reached MMI in March 2003, but he did not release him to work at that time. Although he does not have any personal knowledge about the pro-disc surgery, Dr. Ketcham testified Claimant had unrealistic expectations regarding this procedure. He would not disagree with the recommendation for a psychological evaluation before placing Claimant back at work. (JX-10, pp. 11-13).

Based on Claimant's testimony regarding his overseas trips and the video surveillance of Claimant, Dr. Ketcham testified he seemed to function well, and was probably ready for a trial return to sedentary work as of June 2002. After reviewing Ms. Favaloro's labor market survey, Dr. Ketcham testified he would approve the answering service representative, teller, night auditor, customer service representative, admit clerk and dispatcher positions, but did not approve the job of scheduler as it seemed Claimant would be restricted to sitting at a computer terminal the entire time. Id. at 14-17.

Marvin Carl Covey, M.D.

Dr. Covey, a board-certified pain management specialist and anesthesiologist with a specialty in painful spinal disorders, testified by deposition on October 30, 2003. He was accepted by the parties as an expert witness in the fields of pain management and anesthesiology. Dr. Covey first treated Claimant on April 25, 2003, on a referral from Dr. Ketcham who relocated to Illinois. (JX-13, pp. 1-2).

Claimant initially presented to Dr. Covey with complaints of back pain and bilateral leg numbness, tingling and shooting pain which was worse on the left. Dr. Covey testified he was provided a history of Claimant's work injury, L5-S1 diskectomy, two IDET procedures and the resulting complications. Claimant was taking OxyContin, Neurontin, Zanaflex, Celexa and Prilosec, although Dr. Covey testified he still experienced breakthrough

symptoms including bone and nerve pain. He added that use of OxyContin and Zanaflex may affect Claimant's concentration and memory. Id. at 2-3. Physical examination of Claimant revealed hypesthesia, altered sensation, residual sciatica left and ongoing muscle spasm. Dr. Covey found Claimant had multi-level back pain, degenerative disc disease, and neurological deficits. Claimant was not ready for purely palliative care and discussed at length his desire to be evaluated for a pro-disc surgery. Dr. Covey testified this was medically reasonable given Claimant's young age and desire to return to work. (Id. at 2-3; JX-12, pp. 2-3).

Dr. Covey testified Claimant was not at MMI on April 25, 2003, but without further surgical treatment Claimant's condition would plateau and he would continue to need medical management. Dr. Covey also testified he felt Claimant had unrealistic expectations from the pro-disc surgery, although it would be good for him to be evaluated by the Texas Back Institute to help him "get past" the surgery. If Claimant does not receive the pro-disc surgery, Dr. Covey testified he would explore the use of a permanent pain pump. (JX-13, pp. 4-5, 13). On cross-examination, Dr. Covey testified that absent the pro-disc surgery Claimant had probably reached MMI; it would be possible to increase his function and decrease his pain, but not by significant amounts. Id. at 10.

Claimant next treated with Dr. Covey on August 4, 2003, when he presented with similar complaints of neuropathic and somatic pain in his back and legs. Dr. Covey testified Claimant "definitely had some neurologic disorder from the second IDET procedure." Specifically, he noted Claimant suffered neurogenic claudication as well as signs of cauda equina syndrome. (Id. at 5; JX-12, p. 4). Dr. Covey recommended lumbar MRI and NCVS/EMG studies, an implanted intrathecal infusion system as well as a new back brace and "SI" belt. He testified the results of the September 12, 2003 MRI and October 7 EMG were consistent with Claimant's complaints and did not change his diagnosis or recommendations. In particular, the MRI showed normal lumbar alignment, mild degeneration at L5-S1, mild bulging at L2-3, L3-4 and L4-5, but no disc protrusion or stenosis. (JX-13, p. 8; JX-21). His last treatment of Claimant was October 31, 2003, at which time Claimant presented with the same symptoms; Dr. Covey found his condition unchanged. (JX-12, p. 9).

Dr. Covey declined to assign restrictions to Claimant's activities because he had not heard from the physical therapist. Additionally, he needed more information from Claimant and his

treating physicians before assigning specific work restrictions. Dr. Covey indicated an FCE would be helpful and he probably would start Claimant at light duty work, part-time. (JX-13, p. 8).

On cross-examination, Dr. Covey testified Claimant was not able to perform sedentary work "just yet", secondary to his depression and anxiety. He also explained Claimant would not be able to perform a purely sedentary position, as he needed to be able to move around and change postural positions. Id. at 9-10. Upon reviewing the August 2000 labor market survey, Dr. Covey testified the desk clerk and night auditor positions would be ideal for Claimant, as they were within his intellectual and physical abilities and allowed him to move around. He clarified he did not know Claimant well enough to release him to work, and he has kept Claimant on no-work status pending further evaluation. Id. at 11-12.

Dr. Covey diagnosed Claimant with post-laminectomy syndrome, persistent nerve root irritation, multi-level degenerative disc disease, and nerve injury with neuropathic pain. He testified it was very reasonable to relate Claimant's condition to his work injury and/or subsequent treatment. If Claimant did not receive the pro-disc surgery, Dr. Covey testified he would recommend exploring the implanted device for palliative and rehabilitative treatment of Claimant's condition. While he testified steroid injections would also decrease Claimant's symptoms, Dr. Covey stated Claimant was not a candidate for a disc fusion; he explained Claimant would continue to be in chronic pain.

On cross-examination, Dr. Covey recommended behavioral training, physical and nutritional therapy. (JX-13, pp. 8-9, 11). Despite his hesitation to assign specific restrictions, Dr. Covey testified Claimant would need to take at least one break per hour when driving, should drive an automatic transmission and should use a lumbar support. Id. at 9.

Dr. Covey testified swim therapy would be a "wonderful option" for Claimant; rehabilitation at the Mountain Crest facility would be more reasonable than installing an endless pool at Claimant's house. Dr. Covey explained Claimant does not necessarily need the adjustable water flow of an endless pool, the Mountain Crest facility was more cost effective, and it would be good for Claimant to be social during his therapies. Id. at 8.

Jim J. Moore, M.D.

Dr. Moore testified by deposition on October 30, 2003. He had practiced neurological surgery privately since the completion of his residency in 1963. Employer requested Dr. Moore to perform a neurological evaluation of Claimant. The initial evaluation was April 2, 2002, at which time Dr. Moore reviewed Claimant's medical records, CT diskograms from June 27, 2000 and August 23, 2001, but not his MRI reports. He understood Claimant suffered a twisting and lifting injury to his back on or around February 16, 1995, and underwent a lumbar disc surgery, numerous injections and two IDET procedures which left him with marked weakness in his legs. (JX-14, p. 4; JX-15, p. 1).

Upon physical examination, Dr. Moore found Claimant exhibited sensory depression in the web of his left great toe, numbness and weak toe strength and hypoactive patellae reflexes. He testified that almost normal straight leg raise tests, lack of muscle atrophy and normal Achilles response indicated Claimant did not suffer a neurological injury from the work accident. Claimant also had a negative cremasteric reflex, which Dr. Moore testified indicated neural damage to the conus at T12-L1 extending down to the cauda equina, or the web of nerves supplying the lower extremities and genitals. (JX-14, p. 5; JX-15, p. 2). Claimant exhibited signs of subtotal cauda equina syndrome, specifically lack of sensation across the saddle of his genitals. Dr. Moore explained complete cauda equina syndrome results in rectal incontinence, but Claimant's case is not as severe. He testified the problem is either urological or neurological; thus, he recommended a urological evaluation as medically reasonable and necessary to determine the cause. If the cauda equina syndrome is neurological, Dr. Moore would relate it to the complications in Claimant's IDET procedure, not his injury. He explained the IDET procedure usually does not have any side effects, but the most common one would be nerve damage to the cauda equina. Though the condition is not curable, Dr. Moore testified Claimant's pain can be managed with medication. (JX-15, pp. 2-3, 13; JX-14, p. 4).

Dr. Moore also diagnosed Claimant with failed back syndrome and advanced disc degeneration "not … necessarily related to the injury process." He noted Claimant's paraparesis he suffered after his second IDET procedure had improved with some residual symptoms. Dr. Moore recommended Claimant continue with his medications, and indicated psychosomatic support may be

justified; he restricted Claimant to "sedentary activity levels for the foreseeable future." (JX-14, p. 5; JX-15, p. 4).

Dr. Moore performed an updated evaluation of Claimant on July 7, 2003. Claimant complained of hip pain greater in the right side and tingling feet greater on the left side. Dr. Moore noted Claimant ambulated with a cane and used firm corset support; his back range was painful at 50%. He reported Claimant's complaints were consistent with neurogenic claudication. He also noted Claimant was given a prescription for Flomax in lieu of his previous recommendation for a urological evaluation. (JX-14, p. 1). Physical examination of Claimant revealed a limp involving his left leg, satisfactory heel-toe walking and negative straight leg raise testing. Claimant continued to show signs of cauda equina syndrome secondary to a problem with interoperative management; however, Dr. Moore testified there was no neurological explanation for Claimant's back pain. (JX-15, pp. 6-7).

Dr. Moore stated Claimant was not a candidate for any surgery, including the pro-disc surgery, because he does not have a pathological disc or instability in his back. Although Dr. Moore admitted he was not familiar with the mechanics of the pro-disc surgery, he testified Claimant had unrealistic expectations from the procedure. Dr. Moore noted bracing would be beneficial, but then testified Claimant should only use a brace when he expects to exceed his physical abilities; otherwise, Claimant should work to strengthen his back muscles instead of rely on a brace the entire time. Dr. Moore also recommended additional EMG/NCV studies and lumbar MRIs. (JX-15, pp. 6-7, 14). He did not recommend a permanent pain pump because Claimant's problem was mechanical and not malignant. Additionally, he concluded since a TENS unit did not provide Claimant much relief in the past, a pain pump would probably not be effective either. Id. at 8.

At the second evaluation, Dr. Moore diagnosed Claimant with failed back syndrome from the work injury and subsequent treatment, as well as cauda equina syndrome. (JX-14, pp. 2-3; JX-15, p. 13). He testified the September 12, 2003 MRI did not change his opinion, as it did not reveal any neurological problems. Dr. Moore added that the EMG did not address the saddle component of Claimant's problems. (JX-15, p. 7).

Dr. Moore testified Claimant's physical condition probably limited him to sedentary type activities; he opined Claimant's injury resulted in a 15% whole body disability. Although he did

not assign specific work restrictions, Dr. Moore stated he would recommend an FCE and restrict Claimant from any heavy labor work. Upon reviewing the August 7, 2002 labor market survey, Dr. Moore testified he would approve all the jobs listed on a trial basis, adding that Claimant may have difficulty with the route sales position which required getting in and out of a car frequently. Id. at 5-6.

Dr. Moore further testified that hydrotherapy would be a "wonderful strengthening modality" for Claimant; he stated it would be more beneficial than regular physical therapy. Specifically, he recommended a swimming pool in lieu of an endless pool because a swimming pool allowed more opportunity to adjust his exercises. However, he added that if nothing else was available, an in-home endless pool would be medically reasonable and necessary. While the Mountain Crest Rehabilitation facility was the "Cadillac of treatment," Dr. Moore testified traveling more than 30 minutes one way to the facility would diminish the overall results of any treatment Claimant received. Dr. Moore testified an in-home hot tub was not medically necessary because it was a passive modality, and Claimant needed to be active to increase his functioning. (JX-15, pp. 8-11). Although he opined Claimant was close to MMI, Dr. Moore testified hydrotherapy and strengthening exercises would be beneficial and may cancel out MMI. Id. at 14-15.

Edward Harold Saer, III, M.D.

Dr. Saer testified by deposition on October 30, 2003; the parties stipulated to his status as an expert witness in the field of orthopedic surgery. Dr. Saer first treated Claimant in 1995 following his work-related injury; he diagnosed Claimant with a L5-S1 disc herniation on May 8, 1996. Dr. Saer next treated Claimant on September 12, 2003, for an opinion regarding Dr. Moore's recommendations of an MRI with contrast, an EMG, CT myelogram and urological evaluation. Claimant informed him of the 1998 diskectomy, subsequent IDET procedures, and his continuing pain. (JX-17, pp. 1-3).

At the September 12, 2003 exam, Claimant reported problems walking, sitting and standing for long periods of time; he had a cane, but could walk pretty well without it, tilted to the right and had a well-healed surgical scar. Claimant had limited motion, but no muscle spasm. A review of Claimant's x-rays revealed narrowing and degenerative changes at L3-4, L4-5 and L5-S1, but no recurrent herniation or spondylolisthesis. Dr. Saer testified Claimant most likely had failed back syndrome as

the surgery did not resolve his pain. Dr. Saer agreed with Dr. Moore's recommendations for further diagnostic studies. He explained cauda equina syndrome results in leg weakness as well as bladder and bowel problems; it is a rare side-effect of an IDET procedure, although it can occur if the procedure is not done properly. (JX-17, p. 3; JX-16, pp. 1-2). Dr. Saer further elaborated if a coil is overheated during an IDET the patient would notice it right away and the procedure would be terminated immediately. (JX-17, p. 5).

Dr. Saer testified he is familiar with the pro-disc surgery and the studies to explore its effectiveness; he testified Claimant is not a candidate to be evaluated for the procedure. Dr. Saer explained few people are actually undergoing the procedure, and even then it is only done on one or two discs; Claimant has degenerative changes on multiple levels. Before being evaluated for pro-disc surgery, Dr. Saer recommended Claimant obtain a repeat discogram and MRI to determine where the pain is coming from. A review of Claimant's October 17, 2003 EMG provided objective evidence of a possible nerve root impingement at the L5-S1 level. Dr. Saer testified the fouled IDET procedure could account for Claimant's pain which was otherwise not consistent with a L5-S1 diskectomy. (JX-17, pp. 4-5, 7; JX-16, p. 3).

Claimant followed-up with Dr. Saer on September 23, 2003, after an updated MRI report. At that time, Dr. Saer noted further surgery would not be helpful to Claimant; although he noted Claimant has multiple discs wearing down, Dr. Saer could not say which ones were causing his pain. As such, surgery was not advisable. Dr. Saer testified the October 2003 EMG study does not change his opinion. (JX-17, p. 5). Dr. Saer further testified that although Claimant probably reached MMI with respect to his surgeries, he was still having problems and required medical management. Dr. Saer deferred to Dr. Covey on the modalities of therapy Claimant will undergo, but he testified work-hardening or physical therapy programs will most likely not work to put Claimant back to Longshore work. (JX-17, pp. 5-6). He also testified a course of aqua or hydrotherapy, as recommended by Dr. Covey and Dr. Moore, is "worth a try." Dr. Saer explained he would recommend trial hydrotherapy at a rehabilitation facility or YMCA before recommending an in-home endless pool. Id. at 6-7.

Dr. Saer further testified he did not feel Claimant was capable of working as of September 23, 2003; he added that Claimant will probably end up functional in sedentary to light

categories. He also opined Claimant suffered a 10% whole body disability rating. Id. at 6.

Health South Physical Therapy

Claimant's extensive records from Health South Physical Therapy were admitted as JX-8. The first evaluation of record was June 4, 1998, at which time he presented with stiffness, parasthesia and burning in his left leg, as well as spasm in his left hamstring. Claimant exhibited static spine with tightness in the paravertebral musculature, and significantly decreased lumbar mobility. Physical therapist Marcus Jones noted Claimant's treatment would include moist heat, therapeutic exercise, lumbar range of motion exercises, joint mobilization and a home exercise program. (JX-8, pp. 16-17). Claimant attended 12 physical therapy sessions through July 8, 1998, which increased his lumbar mobility. Id. at 1-16.

Claimant returned to Health South on March 4, 1999, for a second evaluation. Mr. Jones noted Claimant shifted his weight secondary to pain, and all his motions were limited approximately 50% due to pain. Claimant also exhibited moderately severe connective tissue restrictions from L2 through L5; he reported that his back pain limited his ability to work. Mr. Jones initiated physical therapy including moist heat, ultrasound, therapeutic exercise, manual therapy, a S1 belt and home exercise program. Id. at 65-66. Claimant attended 34 physical therapy sessions through June 11, 1999, with modest improvement. Id. at 27-66.

Following his April 12, 2001 IDET procedure, Claimant once again commenced physical therapy at Health South on May 4, 2001. Claimant reportedly felt better since the IDET, but complained of sciatica in his left leg, pressure in his lower back, radiating left hip pain and stiffness in the mornings. His pain was not improved with postural changes. An evaluation revealed a flat lumbar spine in standing and functional lower extremity strength. Mr. Jones noted Claimant's chief complaint was left leg pain and sciatica. He recommended physical therapy modalities as needed, including a "pain-free protocol ex, HEP". (JX-8, pp. 108-09). Claimant attended physical therapy through August 2, 2001.

On December 4, 2001, he was re-evaluated by Mr. Jones. Claimant complained of spasm which restricted his activities, otherwise he was fairly healthy with only moderately restricted hamstring flexion. Mr. Jones recommended skilled rehabilitation

therapy and a home exercise program to improve Claimant's gait, pain and range of motion. Id. at 80-107, 116.

Claimant attended physical therapy sessions regularly through September 30, 2002. On March 1, 2002, Mr. Jones reported Claimant's overall condition was a little better and he was complying with the home exercise program. Claimant's numbness had not improved, but his functional capacity did improve and his mobility increased with walking. Id. at 207. On May 23, 2002, Mr. Jones noted Claimant still had bilateral parasthesia with mild improvement on the left; his gait and spasms were also mildly improving and range of motion had increased. Id. at 156-59. Mr. Jones reported on August 21, 2002, that Claimant was slowly improving and exhibited less of a limp and minimal pain improvement. He recommended pool therapy for Claimant in a letter to Employer dated September 6, 2002. Mr. Jones stated Claimant was an ideal candidate for a home pool rehabilitation unit which would allow the unloading of multiple joint segments, pain relief with heat and water flow, prevent stress and deterioration of the lumbar spine and could possibly result in the reduction of Claimant's medications. Id. at 231, 268. In his September 30, 2002 discharge note, Mr. Jones noted Claimant was overall not a working individual. He stated he would try pool therapy per the instruction of Claimant's physician. He opined Claimant's prognosis was fair, noting his minimal improvement over the last weeks of his therapy. Mr. Jones stated Claimant may benefit from pool therapy. Id. at 253-54.

Claimant was once again evaluated for physical therapy on August 13, 2003. Claimant reported he was unable to work and complained of lumbosacral pain, loss of motion, stiffness, and spasm throughout his legs. Mr. Jones recommended a home exercise program and therapeutic exercises. The record indicates Claimant attended physical therapy sessions through at least October 21, 2003. (JX-8, pp. 258-60, 273-300).

The Vocational Evidence

Nancy T. Favaloro

At the hearing the parties stipulated to Ms. Favaloro's status as an expert in the field of vocational rehabilitation. Ms. Favaloro first met Claimant on April 1, 1996, in connection with the original hearing in this matter. At this meeting she administered the Woodcock-Johnson Revised academic achievement test, which indicated Claimant was at a 16.9 grade level for

verbal and 8.3 grade level for algebra. He got to the 10.8 grade level on the applied problems test, but had to stop early, secondary to pain. (Tr. 180-82). Ms. Favaloro also reported Claimant had prior experience as a maintenance specialist at Employer, owning and operating a seafood supply company, driving trucks, working as an AC mechanic and crane operator, and selling radio time and real estate. (JX-22, pp. 1, 6).

In 1999, Ms. Favaloro conducted a labor market survey based upon the work restrictions assigned by Dr. Runnels in December 1998. In her report dated June 2, 1999, Ms. Favaloro identified seven jobs located in or near Harrison, Arkansas, including service advisor ($6.00/hour), sales ($22,000 annually), furniture sales (max $50,000 annually), manager trainee ($24,000 annually), service advisor ($500 per week), admit clerk, and front desk clerk/night auditor ($5.15/hour). The positions were all in the light and sedentary category and were approved by Dr. Runnels. Ms. Favaloro stated the jobs were appropriate for Claimant based on his academic performance and work experience. Pursuant to this labor market survey, Ms. Favaloro reported Claimant was capable of earning $22,000 to $30,000 per year, although two positions paid minimum wage. (Tr. 183-85; JX-22, pp. 2-4).

On cross-examination, Ms. Favaloro testified the service advisor position was based on qualifications, but that it probably had a commission component; the job paid $6/hour, or about $700/week. She clarified that the radio sales position would require Claimant to make some visits, but the employer did not divulge the wages. (Tr. 200-02). Additionally, the furniture sales position did not require heavy lifting. The salary of a sales job was capped at $50,000, but Ms. Favaloro admitted Claimant was not guaranteed to make that much. She testified that although the rental car agency has come to prefer college graduates in recent years, she did not know their preferences back in 1998 or 1999 when she originally performed her job search. (Tr. 203-04). Ms. Favaloro testified the service position at a car dealership had already been filled. Additionally, the admit clerk job had also been filled and was not available on March 15, 1999. Finally, the night auditor job paid $5.15/hour in 1999, but she testified the minimum wage at the time of Claimant's accident was only $4.25. (Tr. 205-210).

Ms. Favaloro further testified on cross-examination that she did not attempt to contact Claimant's treating physicians; Employer only asked her to review Dr. Runnels' reports and restrictions and that is what she based her survey on.

Additionally, she stated she did not consider the side-effects of Claimant's medications, as it is not within her expertise to do so. Ms. Favaloro testified she usually instructs Employers about the side-effects of medications. (Tr. 191-95). She does not recall doing previous labor market surveys in Boone County, AR, where Claimant resides, but has handled a handful of cases in Little Rock, AR. (Tr. 196). Ms. Favaloro clarified the employers listed in her initial survey either had actual openings or were accepting applications and both situations indicated to her a job was available. However, she testified she did not re-contact each employer between the time she talked to them and when she issued her June 1999 report. She stated Dr. Runnels did not place specific driving restrictions on Claimant and approved jobs which required him to "make visits." (Tr. 197-98, 201, 208).

Ms. Favaloro updated the labor market survey in August 2002. At this time she met with Claimant again and reviewed additional medical information from Dr. Ketcham and Dr. Moore. Her report dated August 7, 2002, listed six positions in Harrison, AR, and one in Ridgedale, MO, including: bank teller ($8.00/hour), emergency dispatcher ($7.99/hour), data entry ($7.00/hour), front desk clerk/auditor ($5.50/hour), admit clerk ($6-6.50/hour), and route sales ($36,800 annually). Each position was sedentary with the ability to alternate sitting, standing and walking. They were actually available and, in her opinion, Claimant could realistically compete for them. Ms. Favaloro opined Claimant was employable at wages between $5.50 and $8.00 per hour. (Tr. 185-86; JX-22, pp. 6-8).

Ms. Favaloro testified she did not submit the August 2002 survey to Claimant's treating physicians for approval. However, she based the survey on Dr. Ketcham's restrictions of sedentary labor with lifting up to 15 pounds; no repetitive stooping, squatting or bending; and alternate sitting and standing. (Tr. 210). Ms. Favaloro conceded that based on Dr. Ketcham's testimony that Claimant was capable of sedentary life activities, but not sedentary work activities, the jobs she included in her report were not appropriate. She also acknowledged Dr. Moore released Claimant to sedentary work "in the foreseeable future" and several doctors had recommended an FCE. (Tr. 211-12). Ms. Favaloro testified Bank One accepted applications for tellers year round. She did not tell the employer about Claimant's medications and side-effects, but did inform them of Dr. Ketcham's restrictions. Ms. Favaloro further testified the police dispatcher position did not require heavy lifting and was currently open. The administrative clerk

position required sitting 70% of the time. Also, Ms. Favaloro testified that based on Dr. Moore's opinion that Claimant should not drive, the route sales position did not constitute suitable alternative employment. However, she clarified that many driving jobs are classified as sedentary in the DOT. (Tr. 213-18).

Ms. Favaloro issued another updated labor market survey on November 18, 2003, based on a third meeting with Claimant and updated reports from Dr. Covey, Dr. Moore and Dr. Saer. Again, she identified seven jobs in Harrison and one in Branson, MO, which she testified were actually open and available to Claimant. The jobs listed were answer service representative ($6.00/hour), bank teller ($7.00/hour), night auditor ($5.50/hour), scheduler ($7.50/hour), customer service representative ($8.50/hour), hospital admit clerk ($5.50/hour) and emergency dispatcher ($8.24/hour). Ms. Favaloro stated these jobs were all in the light or sedentary labor categories, and were approved by Claimant's physicians. However, when presented with this updated labor market survey, Dr. Covey only approved the night auditor and emergency dispatcher positions. (Tr. 187-89; JX-22, pp. 11, 16-17). Ms. Favaloro added that the survey was just a survey and there were likely other available jobs in the area. On December 2, 2003, she offered complete vocational services to Claimant, including job seeking skills training, resume preparation and vocational counseling, but he did not accept the offer. (Tr. 189-90; JX-22, p. 13).

At the hearing, Ms. Favaloro clarified that the answering service representative was a sedentary position and was available "in the near future." The Bank of the Ozarks was "expecting to hire" but the job may exceed sedentary restrictions as it required lifting of 10-15 pounds. (Tr. 218-220). Ms. Favaloro further testified the Federal Express Representative position required previous sales or customer service experience; she stated Claimant acquired the necessary experience when he ran his own seafood shop. Finally, Ms. Favaloro clarified that the administrative clerk paid up to $7/hour in November 2003, and the police dispatcher paid $17,139/year, or about $8.24/hour. (Tr. 221-23).

Although Ms. Favaloro was aware Dr. Covey questioned whether Claimant was emotionally prepared to work, she pointed out he also testified he wanted to see Claimant in a job within his restrictions. She testified on re-direct examination that all the jobs she identified were within Claimant's physical restrictions of no heavy work, no weight-bearing or sitting

longer than 45 minutes in an 8-hour day. She admitted Claimant's inability to attend to tasks consistently would negatively impact his employability; however, she only looked at the medical opinions and did not consider Claimant's self-professed restrictions. (Tr. 226-28). Ms. Favaloro clarified Branson, Berryville, and Oakton were all approximately 30 miles from Claimant's home. Although Dr. Moore restricted Claimant from driving more than 20 minutes, Ms. Favaloro testified she uses a radius of 40 miles one-way in all DOL cases. (Tr. 226).

Contentions of the Parties

Employer contends Claimant is permanently partially disabled from December 22, 1998 through April 11, 2001, and again from January 29, 2002 to the present and continuing. While it stipulated that Claimant was temporarily totally disabled following his March 20, 1998 diskectomy, Employer argues the stipulation was not intended to be permanent, but contemplated Claimant's condition would improve at some point after the surgery. Employer asserts Dr. Runnels' opinion that Claimant was at MMI in December 1998 is corroborated by the fact Claimant traveled to the Philippines the previous August. Employer also contends Claimant is capable of returning to sedentary or light duty work per the opinions of Dr. Hunt, Dr. Friedlander, Dr. Ketcham and Dr. Covey. Employer challenges the credibility of Claimant's testimony that he is a couch potato, contending Claimant downplayed his active lifestyle to conceal his physical abilities.

Additionally, Employer contends Claimant's medical condition does not necessitate the installation of an endless pool at his home. Employer argues it never received a formal request for a hot tub, and this modality was not addressed by Claimant's doctors or brought before the District Director, therefore this issue is not properly before the undersigned. Employer also contends Claimant is not entitled to be evaluated for a pro-disc surgery, as the procedure is experimental and none of Claimant's doctors indicated the surgery could improve Claimant's physical condition.

Claimant contends Employer has failed to show a substantial improvement or change in his medical condition sufficient to support a Section 22 modification. Specifically, Claimant asserts none of his treating physicians have declared him to be at MMI or released him to work, in light of his significant pain and spasm. Claimant points out Dr. Runnels' restrictions are contradictory as the 25-pound lifting limit does not fall within

the sedentary work category he assigned Claimant. Further, Claimant contends the labor market surveys are incomplete as Ms. Favaloro did not contact his treating physicians or consider the side-effects of his medications. Finally, Claimant contends he is entitled to hydrotherapy at the Mountaincrest facility, an in-home hot tub, a urological evaluation secondary to the cauda equina syndrome, and an evaluation by the Texas Back Institute to explore the possibility of undergoing a pro-disc surgery.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 277 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g. 990 F.2d 730 (3rd. Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Co., 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Section 22 of the Act permits any party-in-interest to request modification of a compensation award for mistake of fact or change in physical or economic condition. See Metropolitan Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291 (1995). The party requesting modification has the burden of proof to show a mistake of fact or change in condition. See Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428 (1990); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168 (1994). The rationale for allowing modification of a previous compensation award is to render justice under the Act. Congress intended Section 22 modification to displace traditional notions of res

judicata, and to allow the fact-finder, within the proper time frame after a final decision and order, to consider newly submitted evidence or to further reflect on the evidence initially submitted. Hudson v. Southwestern Barge Fleet Services, 16 BRBS 367 (1984).

After the original hearing and subsequent appeal, I issued a 1999 Decision and Order on Remand finding Claimant temporarily totally disabled from March 17, 1995 to April 14, 1996, based on his stipulated average weekly wage of $1,025.07; temporarily partially disabled from April 15, 1996 to March 19, 1998, based on a residual wage earning capacity of $240.00 per week; and temporarily totally disabled from March 20, 1998 and continuing. Employer does not argue a mistake of fact warrants a Section 22 modification. Rather, Employer argues there has been a change in Claimant's physical condition and, as a result, he is capable of returning to work and earning wages.

An initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating there has been a change in circumstances and/or conditions. Duran v. Interport Maintenance Corp., 27 BRBS 8 (1993); Jensen v. Weeks Marine, Inc., 34 BRBS 147 (2000). This inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the contention within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in physical or economic condition. Id. at 149.

In the present case, the joint exhibits clearly demonstrate a change in Claimant's physical condition and, in turn, his economic condition, sufficient to support a Section 22 Modification. Nine months after Claimant's L5-S1 diskectomy, on December 22, 1998, Dr. Runnels opined Claimant was at MMI and assigned him physical restrictions accordingly. In January 2000, Dr. Ketcham found Claimant not able to work and not at MMI; however, Dr. Friedlander and Dr. Hunt both opined in April 2000 that Claimant could perform light duty work. Indeed, Employer identified suitable alternative employment in a June 2, 1999 labor market survey, see infra. Following a period of temporary total disability secondary to the IDET procedures, Dr. Ketcham assigned Claimant sedentary work restrictions in January 2002 and testified his condition had stabilized as of March 2002. Dr. Covey, Dr. Saer and Dr. Moore all opined Claimant was

at MMI in 2002 and 2003. Further, Employer submitted an updated labor market survey re-establishing suitable alternative employment in August 2002. Thus, there is sufficient evidence to show a change in Claimant's physical condition, and, in turn, his economic condition, to bring this case within the applicability of Section 22.

A. Nature and Extent of Disability

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as the "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

(1) Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981). An employee is considered permanently disabled if he has any residual disability after reaching MMI. Lozada v. General Dynamics Corp., 903 F.2d 168 (2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition. Leech v. Service Engineering Co., 15 BRBS 18 (1982).

In the present matter, Employer relies on the opinion of Dr. Runnels that Claimant reached MMI on December 22, 1998, to support its contention Claimant was permanently disabled as of this date. I hesitate to rely on the opinion of one doctor who only examined Claimant on one occasion in making a determination of whether Claimant's condition stabilized and reached maximum medical improvement. Dr. Pieper, Claimant's treating neurosurgeon, made no finding of maximum medical improvement. Indeed, September 1998 diagnostic studies revealed continued neuropathy and radicular pain which had not improved as of February 1999. Dr. Money, a pain management consultant, recommended a lumbar SPECT scan and a course of physical therapy in December 1998. Indeed, Claimant attended physical therapy from March 4, 1999 through June 11, 1999, to improve his limited

mobility and lumbar connective tissue restrictions. Claimant achieved modest improvement throughout this treatment.

Although Dr. Schlesinger's records are not in evidence, he referred Claimant to Dr. Ketcham in January 2000, and apparently treated Claimant at some point during 1999. Dr. Ketcham opined Claimant was not at MMI, and suggested a course of treatment which included medications, epidural injections, IDET procedure and possible surgery. In April 2000, Dr. Friedlander and Dr. Hunt also recommended further diagnostic studies to find and treat the source of Claimant's pain. Thus, I find the opinions of Drs. Money, Ketcham, Friedlander and Hunt recommending further diagnostic studies more probative and they outweigh the isolated opinion of Dr. Runnels that Claimant's condition had stabilized and he was at MMI in December 1998.

However, Dr. Ketcham testified Claimant's condition likely stabilized in March 2002, following a grossly unsuccessful IDET procedure on November 8, 2001. On December 10, 2001, Dr. Ketcham noted improvement in Claimant's muscle strength and gait, although Claimant suffered nerve damage and required rehabilitative therapy. Claimant complained of continued muscle spasm and leg cramping on March 4, 2002, but Dr. Ketcham noted his back pain and strength had improved. Over the course of the following six months, Dr. Ketcham did not report any neurological changes in Claimant's condition. In June 2002, Dr. Ketcham recommended long-term therapy, and in September 2002 he indicated Claimant's condition remained unchanged. Dr. Ketcham wrote a letter of referral to the Texas Back Institute in October 2002, indicating Claimant's condition had stabilized in March 2002.

A claimant reaches maximum medical improvement when his medical condition stabilizes. The Board has also held, in dicta, that maximum medical improvement can be established even when further improvement is likely at some unspecified point in the future. Walsh v. Vappi Constr. Co., 13 BRBS 442, 445 (1981). Thus, although Dr. Ketcham testified Claimant had not reached MMI because there was the possibility further therapy could improve his functioning, the medical records indicating Claimant's condition was unchanged support a finding of MMI as of March 4, 2002. In April 2002, Dr. Moore opined Claimant's condition improved following the November 2001 IDET, with residual symptoms. Dr. Moore recommended a urological evaluation to monitor Claimant's cauda equina syndrome, indicating the condition is not curable but can be medically managed. Although Dr. Moore did not note any changes in

Claimant's condition from April 2002 to July 2003, he testified Claimant had not quite reached MMI as further hydrotherapy and physical therapy could improve his functioning. In April 2003 Dr. Covey opined Claimant's condition would plateau absent further surgical treatment. Additionally, Dr. Saer testified that as of September and October 2003, Claimant was not a surgical candidate and probably reached MMI with respect to his back surgeries, although he still required medical management. Moreover, Health South Physical Therapy records indicate Claimant made slow, minimal improvement throughout his treatments in 2002. No doctor recommended surgery, and the overall opinions were that Claimant will need long-term pain management.

Thus, based on the foregoing medical evidence, in particular the records of Claimant's treating physician, Dr. Ketcham, I find it reasonable to conclude Claimant's condition stabilized and he reached maximum medical improvement on March 4, 2002. Therefore, it follows that Claimant's temporary disability became permanent as of this date.

(2) Suitable Alternative Employment

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). An injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991); Director, OWCP v. Bethlehem Steel Corporation (Dollins), 949 F.2d 185, 186 n. 1 (5th Cir. 1991).

In the present case, the parties stipulated Claimant is unable to return to his former job as a maintenance supervisor for Employer. This stipulation is supported by the opinions of each physician who examined Claimant that he was incapable of heavy duty work. Employer has established Claimant's physical and economic conditions have changed since the original Decision and Order, thus it now has the burden to establish suitable

alternative employment to support a finding of partial disability on modification.

Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one unskilled

job may not satisfy Employer's burden.

In the present case, Employer submitted a labor market survey dated June 2, 1999, identifying eight sedentary positions in Claimant's geographic area. Based on the testimony of Employer's vocational expert, however, I find the admit clerk and service advisor positions were not available to Claimant, as they had been filled prior to the report being released. Additionally, Ms. Favaloro conceded the radio sales position may not be suitable for Claimant as he may experience difficulty getting in and out of his car. The remaining positions of front desk clerk, night auditor, furniture salesman, manager trainee and a second service advisor position were all available to Claimant, were within his academic capability to perform as well as Dr. Runnels' physical restrictions of sedentary work with no repetitive bending, overhead work or lifting more than twenty-five pounds.

Although no other doctor had released Claimant to work in 1999, I note Dr. Pieper did not comment on Claimant's work capabilities, but indicated he returned to a full use of the muscles in his lower extremities. Additionally, Claimant made modest improvement in his physical therapy and was able to travel to the Philippines in 1998. Further, although Claimant testified he is a "couch potato" much of the time, he also testified he drives approximately ten miles into town to run errands a few times per week, and tries to do work in and around his house. This was corroborated by his neighbor, Mr. Milum, who testified he has observed Claimant do yard work since 1998.[1] Thus, the evidence is not consistent with a "couch potato" lifestyle, as Claimant admitted himself he is somewhat active. I consider these activities sufficient to support a return to sedentary work activities in 1999. As such, I find Claimant could reasonably perform the jobs available to Claimant in the June 2, 1999 labor market survey, including front desk clerk/night auditor, furniture salesman, manager trainee and service advisor. Considering Claimant is a high school graduate

[1] I note there is a significant amount of ill will between Claimant and Mr. Milum, stemming from years of legal disputes over their adjacent properties. Mr. Milum took video of Claimant working outside his house, although the quality of the tape is poor with minimal clear views of Claimant. As such, I do not consider Mr. Milum to be a disinterested witness and I find his testimony is only credible to the extent it is corroborated by other evidence.

with previous business experience, I also find he would be a competitive applicant for these positions. Therefore, Employer successfully established suitable alternative employment on June 2, 1999, and Claimant's disability became partial as of that date.[2] Based on an average of the weekly wages offered by each of the four jobs found suitable for Claimant, I find he had a residual wage earning capacity of $532.27 per week ($961.54 + 461.54 + 500.00 + 206.00 = $2,129.08 ÷ 4 = $532.27) as of June 2, 1999.

Employer concedes Claimant was temporarily totally disabled following his April 12, 2001 and November 8, 2001 IDET procedures. However, it contends Claimant was able to return to work as early as January 29, 2002 and submitted into evidence a second labor market survey dated August 7, 2002. As mentioned in footnote two, supra, disability only becomes partial on the date suitable alternative employment is established; partial disability is not based on the medical evidence. Therefore, the issue presented is whether Claimant was capable of working as of August 7, 2002, when Employer proposed suitable alternative employment was available to him.

In a January 29, 2002 letter to Employer, Dr. Ketcham stated Claimant was restricted from lifting more than fifteen pounds, repetitive stooping, squatting or bending, and could not climb more than one flight of stairs twice a day or any ladders. Dr. Ketcham further opined Claimant should be able to do sedentary work within 30-60 days. In April 2002, Dr. Moore opined Claimant was restricted to sedentary activity levels "for the foreseeable future." Additionally, Claimant attended regular physical therapy sessions between March 2, 2002 and September 30, 2002, during which time his overall condition improved. Specifically, Claimant's functional capacity improved, his range of motion increased and his mobility was better with walking. Claimant also testified to performing outdoor work around his house and running errands in town during this time. Although he explained he does not work longer than thirty minutes without taking a break and has both good and bad days of pain, I find this would not prevent him from performing sedentary work. Additionally, Claimant was able to participate in a missionary trip to Russia in June 2002. Employer also

[2] Employer contends Claimant's disability became partial on December 22, 1998, based on Dr. Runnels' report. However, I note partial disability is not based on medical evidence, but rather is based on a showing of suitable alternative employment. Thus, Claimant's disability was total until June 2, 1999.

submitted surveillance videotape of Claimant performing work around his house in March 2001 and April and May, 2002. I do not find this evidence is as incriminating as Employer argues it is, as the quality of the tape is poor, only short bits of time are recorded and Claimant was not performing any strenuous activity in the videos. However, I do find that the video, as well as Claimant's own testimony regarding his activities in 2002, establish he led a somewhat active lifestyle. The fact that Claimant did housework, ran errands and traveled to Russia indicates he did not lead a "couch potato" lifestyle. I discount Claimant's testimony that the side-effects from his medications would prevent him from working, as they do not keep him from these various activities and were not a concern to any of his doctors. Indeed, after viewing the video tapes and learning of Claimant's trip to Russia, even Dr. Ketcham testified he was probably ready for sedentary work in June 2002.

Despite a fair prognosis for the future, Claimant's physical therapist indicated he was not a working individual as of September 30, 2002. Additionally, at his deposition in November 2003, Dr. Ketcham testified Claimant was not capable of sedentary work in January 2002, but only sedentary life activities. There was no explanation for his delayed change in opinion, and I find it significant that Dr. Ketcham changed his mind after viewing the surveillance video and learning of Claimant's trips overseas. Thus, I find Claimant was capable of sedentary work in August 2002, within the restrictions assigned by Dr. Ketcham in January 2002.

Ms. Favaloro's August 7, 2002 labor market survey listed seven jobs which were all in the sedentary work category. Based on her testimony and that of Claimant's physicians, I find the admit clerk and route sales positions are not suitable for Claimant as the first does not allow for enough alternation between sitting and standing, and the second may be problematic considering Claimant's difficulties getting in and out of a car. However, the remaining four jobs of bank teller ($8.00/hour), dispatcher ($7.99/hour), data entry specialist ($7.00/hour), and front desk clerk/night auditor ($5.50/hour) all fit Dr. Ketcham's sedentary work restrictions with alternate sitting and standing. Indeed, these jobs were included on the November 11, 2003 report, and Dr. Covey, Claimant's current treating pain management specialist, specifically approved the dispatcher and night auditor positions as suitable for Claimant. As his physical condition in November 2003 was much the same as in August 2002, and certainly no worse, it is reasonable to conclude Claimant was physically capable of performing these

jobs. Additionally, in July 2003, Dr. Moore approved the 2002 labor market survey. Considering Claimant's age, education and previous work experience, I find he would have been a competitive applicant for these positions. Therefore, Employer successfully established suitable alternative employment on August 7, 2002, and Claimant's disability became partial as of that date. Based on an average of the weekly wages offered by the four jobs found to be suitable for Claimant, I find he had a residual wage earning capacity of $284.90 per week ($8.00 + 7.99 + 7.00 + 5.50 = 28.49 ÷ 4 = $7.12/hr. x 40 hours = $284.90) as of August 7, 2002.

I also find Employer established suitable alternative employment based on Ms. Favaloro's November 11, 2003 updated labor market survey. Dr. Moore, Dr. Covey and Dr. Saer opined in 2003 that Claimant was capable of sedentary activities. The jobs on the updated labor market survey were answer service representative ($6.00/hour), teller ($7.00/hour), night auditor ($5.50/hour), scheduler ($7.50/hour), customer service representative ($8.50/hour), admit clerk ($5.50/hour) and dispatcher ($8.24/hour). These jobs were similar to those in the 2002 survey, which Dr. Moore and Dr. Covey approved, at least in part. At his deposition, Dr. Ketcham approved all the jobs listed in the November 2003 survey, except the scheduler because it required too much sitting. Thus, based on the opinions of these four doctors, two of whom were Claimant's treating physicians, I find it reasonable to conclude Claimant was capable of performing these sedentary jobs in November 2003. Considering his age, education and experience running his own businesses, he would have been a competitive candidate for these positions. Therefore, Employer also established suitable alternative employment on November 11, 2003, at the latest. Excluding the scheduler position, Claimant had a residual wage earning capacity of $271.60 per week ($6.00 + 7.00 + 5.50 + 8.50 + 5.50 + 8.24 = $40.74 ÷ 6 = $6.79 x 40 hrs. = $271.60/week) commencing on November 11, 2003.

In conclusion, I find Claimant's disability was temporary and total from March 20, 1998 until June 2, 1999. On June 2, 1999, Claimant's disability became temporary partial, based on Ms. Favaloro's labor market survey identifying suitable alternative employment at a residual wage earning capacity of $532.27 per week. This continued until Claimant's first IDET procedure on April 12, 2001, after which Employer conceded Claimant was temporarily totally disabled until some time after the November 8, 2001 IDET procedure. I find Claimant was temporarily totally disabled from April 12, 2001 until March 4,

2002, when he reached MMI. From March 4, 2002 until Employer's August 7, 2002 labor market survey, Claimant was permanently totally disabled. I find Claimant has been permanently partially disabled since August 7, 2002 and continuing with a residual wage earning capacity of $284.90 per week, which was reduced to $271.60 per week as of November 11, 2003.

B. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be recognized by the medical profession as appropriate for the care or treatment of the claimant's injury. 20 C.F.R. §§ 702.401-402.

A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187. Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

In the present case, Claimant has requested authorization from Employer to receive a urological evaluation, aqua or hydro-therapy, in-home endless pool and hot tub, and evaluation for

pro-disc surgery. Indeed, Claimant's physicians all recognize the need for long-term pain management and control, secondary to his permanent nerve damage.

Dr. Ketcham, Dr. Covey and Dr. Moore all recommended aquatic therapy to improve Claimant's functioning; Dr. Saer testified it would be "worth a try." Specifically, Dr. Ketcham testified aquatic therapy was medically necessary to increase Claimant's physical abilities and endurance. Although he initially recommended an in-home endless pool, Dr. Ketcham testified aquatic therapy at the Mountaincrest facility would be more reasonable. Dr. Covey agreed, testifying a social atmosphere would be good for Claimant's recovery. Dr. Moore specifically recommended a regular swimming pool, such as the one at Mountaincrest, over an endless pool because the former provides for an opportunity to perform various different exercises. Dr. Moore cautioned that if Claimant had to drive thirty minutes one way to reach the Mountaincrest facility, he may be diminishing the benefit of the therapy he received there. I note that Claimant testified Mountaincrest is located in his hometown of Harrison, AR. There is nothing in the record to indicate it would take Claimant thirty minutes to drive to the facility. As such, I find that Claimant has established a **prima facie** case that aquatic therapy at Mountaincrest is medically reasonable and necessary, but failed to establish a **prima facie** case for an in-home endless pool. Employer did not rebut Claimant's **prima facie** case, as its physicians, in particular Dr. Moore, agreed with the recommendation of aquatic therapy. Thus, although Claimant is not entitled to an in-home endless pool, I find he is entitled to aquatic therapy at the Mountaincrest facility in Harrison, AR.

Claimant also requests an in-home hot tub. Dr. Runnels, Employer's physician, recommended "hot baths" in December 1998. At the same time, Dr. Money specifically reported Claimant's condition did not necessitate hot tub therapy. However, I note these recommendations were prior to Claimant's IDET procedures. In 2003, Dr. Ketcham testified an in-home hot tub was medically necessary and reasonable for Claimant to relieve his low back pain and spasm, and make his return to work much easier. Dr. Ketcham stated that even if there was a facility with a hot tub, Claimant needed an in-home hot tub to use on a frequent basis. Dr. Covey did not address the issue of hot tub therapy. Thus, based on Dr. Ketcham's testimony that in-home hot tub therapy was medically necessary and reasonable for Claimant's condition, I find Claimant established a **prima facie** case therefor. Employer attempted to rebut Claimant's case through Dr. Moore's

testimony that hot tub therapy was not necessary because it was too passive. However, Dr. Moore did not address the benefit hot tub therapy would have on Claimant's pain and spasm, merely noting Claimant needed swim therapy to increase his function. As such, Employer failed to rebut Dr. Ketcham's recommendation of in-home hot tub therapy as necessary for Claimant's back pain and spasm and a successful return to work. Therefore, I find Claimant is entitled to in-home hot tub therapy.

Claimant also asserts he is entitled to a urological evaluation as recommended by Dr. Moore. Indeed, Dr. Moore, Employer's physician, recommended this evaluation as a diagnostic study to assist in the treatment of Claimant's cauda equina syndrome. Dr. Moore appeared displeased after finding out Claimant was prescribed medication in lieu of the urological evaluation and further stressed his recommendation for the evaluation. Additionally, Dr. Saer agreed with Dr. Moore's recommendation for "further diagnostic treatment." As such, Claimant has established that a urological evaluation is medically reasonable and necessary. Employer failed to rebut this evidence and I find Claimant is entitled to a urological evaluation for the treatment of his cauda equina syndrome.

Finally, Claimant has requested authorization for evaluation at the Texas Back Institute to determine if he is a candidate for pro-disc surgery. As the procedure is still undergoing trials for approval by the Food and Drug Administration, I initially find Claimant has failed to establish that the medical profession considers pro-disc surgery appropriate treatment for spinal problems. Moreover, Claimant has not established a **prima facie** case that evaluation for pro-disc surgery would be medically reasonable or necessary for his condition. Dr. Ketcham referred Claimant to the Texas Back Institute, but did not indicate such an evaluation would be medically reasonable or necessary. In fact, he testified he did not know much about the surgery and indicated Claimant had unrealistic expectations regarding the surgery. Dr. Covey recommended evaluation at the Texas Back Institute, but testified he only recommended it to help Claimant "get past it" psychologically. Dr. Covey testified Claimant had unrealistic expectations about what the surgery could do for him.

I find this evidence is insufficient to establish a **prima facie** case that evaluation for pro-disc surgery is medically reasonable or necessary for treatment of Claimant's condition. Furthermore, Dr. Moore testified Claimant is not a candidate for pro-disc surgery, for which Claimant had unrealistic

expectations. Dr. Saer testified he was familiar with the pro-disc surgery and stated Claimant would not be considered a viable candidate because he did not meet the requirements of the study. Specifically, Dr. Saer testified only some of the participants in the study received the pro-disc surgery, and only people with one or two spinal abnormalities are selected for the study. Dr. Saer pointed out Claimant had at least three or four abnormal discs in his lumbar spine. As such, even if Claimant had established a **prima facie** case that pro-disc surgery is medically reasonable and necessary, Employer has sufficiently rebutted the presumption. I conclude the evidence supports a finding that pro-disc surgery would not benefit Claimant and is not medically reasonable or necessary for the treatment of his back condition. Moreover, mere evaluation for such surgery is equally unnecessary. Therefore, I find Claimant is not entitled to evaluation at the Texas Back Institute to determine whether he is a viable candidate for pro-disc surgery.

In conclusion, I find Claimant is entitled to aquatic therapy at the Mountaincrest facility, in-home hot tub therapy and a urological evaluation under Section 7 of the Act. Claimant is not entitled to evaluation for pro-disc surgery at the Texas Back Institute as he has failed to show how this procedure is an accepted method of treatment for his injury and that the surgery or evaluation were medically reasonable and necessary for the treatment of his condition.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by

reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary total disability from March 20, 1998 through June 1, 1999, and from April 12, 2001, through March 3, 2002 based on Claimant's average weekly wage of $1,025.07, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay Claimant compensation for temporary partial disability from June 2, 1999 through April 11, 2001, based on two-thirds of the difference between Claimant's average weekly wage of $1,025.07 and his reduced weekly earning capacity of $532.27, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

3. Employer shall pay Claimant compensation for permanent total disability from March 4, 2002 through August 6, 2002, based on Claimant's average weekly wage of $1,025.07 in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

4. Employer shall pay to Claimant compensation for permanent partial disability from August 7, 2002 through November 10, 2003, based on two-thirds of the difference between Claimant's average weekly wage of $1,025.07 and his reduced

weekly earning capacity of $284.90, in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

5. Employer shall pay to Claimant compensation for permanent partial disability from November 11, 2003 to the present and continuing, based on two-thirds of the difference between Claimant's average weekly wage of $1,025.07 and his reduced weekly earning capacity of $271.60, in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

6. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's February 16, 1995, work injury, pursuant to the provisions of Section 7 of the Act. Specifically, Employer/Carrier shall provide Claimant aquatic therapy, in-home hot tub therapy and a urological evaluation.

7. Employer shall receive credit for all compensation heretofore paid, as and when paid.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days from date of service to file any objections thereto.

ORDERED this 8th day of July, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge